86-141

Supreme Court, U.S.
FILED
JUL 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

RALPH J. PETROZZIELLO,
PETITIONER

v.

COMMONWEALTH of MASSACHUSETTS
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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100 pp

Question Presented for Review

1. Whether the Interstate Agreement on Detainers requires the dismissal of pending indictments when a receiving state returns the prisioner to the sending state without having disposed of all the indictments pending against the prisoner in the receiving state?

Parties to the Proceeding Below

All parties appear in the caption of the case.

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Interstate Agreement on Detainers Mass. Gen. Laws ch. 276 App. et seq. (1970).

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TO THE SUPREME JUDICIAL COURT OF THE
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The Petitioner, Ralph J. Petrozziello ("Petrozziello"), respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in the case of Commonwealth v. Ralph J. Petrozziello on May 30, 1986.

Opinions Below

On September 6, 1984, the Superior Court of the Commonwealth of Massachusetts (Pierce, J.) denied Petrozziello's Motion

to Dismiss Indictments pending against him in Suffolk County. Petrozziello's Motion was based on the fact that he had been improperly returned to federal custody before all pending state charges had been disposed of. Because of the novelty and importance of the legal issue presented by this case, the Superior Court reported the question to the Appeals Court pursuant to Mass. R. Crim. P. 34

On April 15, 1986, the Appeals Court affirmed the trial court's denial of Petrozziello's Motion to Dismiss and issued an opinion.

On May 30, 1986, the Supreme Judicial Court denied Petrozziello's Motion for Further Appellate Review exhausting all remedies available to Petrozziello in the Commonwealth.

Jurisdiction

The judgment of the Supreme Judicial Court was entered on May 30, 1986. The

jurisdiction of this Court is invoked under 28 U.S.C. 1259.

Statute Involved

1. Interstate Agreement on Detainers, Mass. Gen. Laws ch. 276 App. et. seq. (1970).

Statement Of Facts

On October 10, 1979, the defendant, Ralph J. Petrozziello, was indicted on charges of first degree murder and armed robbery. On December 3, 1979, the Suffolk County District Attorney's office applied for a federal flight warrant. On December 5, this warrant together with the original warrant for the defendant's arrest on the murder and robbery charges was delivered to the F.B.I. On August 5, 1983, the defendant was arrested in Huron, Ohio, and taken into federal custody pursuant to the federal flight warrant and a federal parole violation warrant issued September 26, 1979. On August

8, 1983, the federal parole violation warrant was lodged against the defendant at F.C.I. Milan, Michigan, where he was being held.

On August 9, 1983, Lieutenant Robert Hudson, acting on behalf of the Suffolk County District Attorney's Office, sent a detainer letter to F.C.I. Milan, Michigan. Lieutenant Hudson received a reply on August 11, 1983 stating that the detainer had been lodged against Petrozziello and that a tentative release date would be set as soon as Petrozziello had arrived at his designated institution.

On September 22, 1983 the defendant was transferred to F.C.I. Danbury, Connecticut where he was held until he was transferred to the New Hampshire State Prison. He was held in New Hampshire State Prison pursuant to an agreement between New Hampshire and the feder-

al government which permitted federal prisoners to be lodged there.

On December 7, 1983, Petrozziello submitted an Inmate Request Slip to his counsellor at New Hampshire State Prison requesting that he be informed of and provided with copies of all detainers which had been lodged against him. His counsellor responded that he would not receive the information he had requested until after his parole revocation hearing. On December 27, 1983, counsel for the defendant sent a letter to the Suffolk County District Attorney requesting that the defendant be arraigned as soon as possible and that a trial date be set.

At this point, charges were pending against Petrozziello in several Massachusetts counties including Berkshire, Suffolk and Plymouth. The various district attorneys agreed that Petrozziello

would first be tried in Berkshire and, upon completion of that trial, he would be transferred to the other counties which had outstanding indictments against him.

On January 6, 1984, Daniel Ford, Assistant District Attorney of Berkshire County, filed a Petition for a Writ of Habeas Corpus. When the petition was presented to the U.S. Marshall's office in Boston, Deputy Ford was informed it would not be honored until all federal matters were resolved.

Being unable to obtain custody of Petrozziello by Writ of Habeas Corpus, Ford then filed a request for temporary custody pursuant to Section IV of the Interstate Agreement.

It was not until January 9, 1984, that Petrozziello was informed of the detainer lodged against him by the Berkshire County District Attorney's Office.

Shortly after learning of the Berkshire County detainer, Petrozziello requested a speedy disposition of the Berkshire County charges.

On January 24, 1984 Petrozziello was transferred from federal custody to state custody and was held for trial in Berkshire County. When he transferred custody of Petrozziello to the Berkshire County prosecutor, the United States Marshall advised him that Petrozziello was not to be released on bail and was not to be returned to federal custody until all state charges had been disposed of. Thereafter,the Berkshire County District Attorney formally notified his fellow prosecutors in the other counties that Petrozziello had to be tried on all pending state charges before he was returned to federal custody under the provisions of the Interstate Agreement. On January 26, 1984, Petrozziello was arraigned in

Berkshire County on armed robbery charges and on January 30, 1984, he was arraigned in Suffolk County on first degree murder and armed robbery charges. On March 13, 1984 the United States Parole Board revoked defendant's federal parole.

Petrozziello was tried in Berkshire County in late March, 1984. On April 6, 1984, he was found not guilty on all charges.

According to Assistant District Attorney Ford, he and his office were "paralyzed" by the defendant's acquittal. Instead of assuring that Petrozziello was properly transferred to the custody of the prosecutors in Suffolk County, Ford left the transfer to a Massachusetts State Trooper assigned to Ford's office. The Trooper returned Petrozziello to federal custody and advised Ford of his actions. Petrozziello was in federal custody as of April 10. The Suffolk County

District Attorney did not learn that Petrozziello had been returned to federal custody until April 12, 1984, when defense counsel apprised them of the mistaken transfer.

On May 8, 1984, the federal authorities advised Suffolk County that Petrozziello's tentative release date was July 30, 1984.

On or about May 10, 1984, the defendant filed a Motion to Dismiss the Suffolk Indictments on the grounds that the Commonwealth's violation of the Interstate Agreement by returning him to federal custody mandated dismissal.

On September 6, 1984, the court denied Petrozziello's Motion to Dismiss but reported the question to the Appeals Court since the issue obviously was of nationwide significance. On April 15, 1986, the Appeals Court affirmed the trial court's denial of the Motion to Dismiss

and the Supreme Judicial Court refused to grant further appellate review.

REASONS FOR GRANTING WRIT

The Court's Incorrect Application of The Interstate Agreement Has Nationwide Significance.

The petitioner, Ralph Petrozziello, stands charged of first degree murder and armed robbery. He was transferred from federal to state custody to answer charges pending in at least three separate Massachusetts counties -- Berkshire, Suffolk, and Plymouth.

The prosecutors in those three counties agreed that Petrozziello should first be tried in Berkshire County. He was tried there and acquitted. The acquittal was such a shock to the Berkshire District Attorney that he mistakenly returned Petrozziello to federal custody rather than transferring him to the custody of the Suffolk County District Attorney as required. When the Berkshire

County District Attorney returned Petrozziello to federal custody, he violated Petrozziello's rights under the Interstate Agreement. Accordingly, Petrozziello promptly sought dismissal of the Suffolk charges since further prosecutions in Massachusetts were barred by the Interstate Agreement.

At the hearing on the Motion to Dismiss and on appeal, the Commonwealth conceded that the Interstate Agreement had been violated but argued that dismissal was not required. The Appeals Court concurred:

> We do not think that the drastic sanction of dismissal of first degree murder and armed robbery charges should apply where the defendant's return to federal custody was the result of a mistake.

Massachusetts v. Petrozziello, 22 Mass App. Ct. 71, 80 (1986).

The Court should review this deci-

sion because it is clearly contrary to the plain language of the Interstate Agreement which requires dismissal whenever a violation occurs. If this decision is not reversed, it will be utilized as precedent by prosecutors nationwide to justify any and all violations of the Interstate Agreement. Such a result was clearly not intended by Congress and the states which are parties to the Agreement.

This petition presents a narrow legal issue: whether upon finding a violation of the Interstate Agreement a court has the discretion to ignore the Agreement's mandatory dismissal provisions. It is clear from the Agreement itself that courts have no such discretion and that, upon finding a violation of the Agreement, the court must dismiss all untried charges or indictments.

The starting point for analyzing

this issue must be the language of the Agreement itself. Article III(d), governing prisoners requests for disposition, as well as article IV(e) and V(c) mandate dismissal when a prisoner's rights have been violated. Article IV(e), for example, is plain:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Art. V(c) hereof, such indictment, information or complaint shall not be of any further force of effect, and the Court shall enter an order dismissing the same with prejudice.

It is undisputed that "trial was not had" on the Suffolk Indictments prior to returning Petrozziello to his original place of imprisonment (federal custody). The Agreement provides one and only one remedy when such a mistake occurs: dismissal with prejudice of the untried

indictments. The Act does not authorize courts to fashion less drastic remedies or to evaluate whether the mistaken transfer actually had an adverse impact on the prisoner's rehabilitation. Moreover, dismissal is mandated regardless of whether the original transfer was pursuant to Article III, pursuant to a prisoner's request, or Article IV, pursuant to a prosecutor's request for temporary custody.

The Appeals Court has ruled that dismissal is not required unless the prisoner's rehabilitation has been actually affected. In so ruling, the Court has ignored the Agreement's plain language and substituted its judgment for that of Congress and the party states.

The position adopted by the Appeals Court has been rejected elsewhere. In United States v. Sorrell, 413 F. Supp. 138 141 (E.D. Pa. 1976), aff'd, 562 F.2d

227 (3d Cir. 1977), the violation involved the transfer of the defendant from state to federal custody for arraignment and his return to the sending state on the same day. In arguing that such a de minimis violation of the Agreement did not warrant dismissal of the federal charges, the Government relied upon the fact that the prisoner's rehabilitation could not have been negatively affected by the wrongful transfer. The Court rejected such thinking:

> Admittedly, there may be minimal interruptions of the rehabilitative process by a one day trip from Graterford [state prison] and return. However, Congress was not dealing with an individual situation, but rather with an Agreement of national scope... Congress could have written limitations into the Agreement. Again, it did not. And again, it is not for us to legislate.

Id. at 141.

Similarly, in United States v.

Ricketson, 498 F. 2d 367, 373 (7th Cir. 1974), the Seventh Circuit explicitly held that neither the length of the mistaken transfer nor its de minimis nature excuses a violation of the Agreement:

> But there are no exceptions to the requirement that defendant not be returned to state custody untried.

The Appeals Court apparently felt that the serious nature of the pending charges (murder and armed robbery) and the fact that there was no evidence that Petrozziello's rehabilitation had been adversely affected by the improper transfer were factors which permitted the Court to ignore the mandatory dismissal language. If this were so, the Interstate Agreement would be emasculated and courts would be free to ignore the remedy provided by the statute and fashion their own remedies on a case-by-case basis. Had Congress and the party states in-

tended to confer such discretion on the judiciary they would have done so. United States v. Sorrell, 413 F. Supp. 138, 141 (E.D. Pa 1976), aff'd, 562 F.2d 227 (3d Cir. 1977).

The Appeals Court did not cite any federal case which justified its novel interpretation of the Interstate Agreement. Indeed, the only case the court relied upon to justify ignoring the Agreement's plain language is Malone v. United States, 482 A.2d 7768, 771 (D.C. 1984), issued by the District of Columbia Court of Appeals. Malone, however, is of little weight when compared to those federal cases such as Sorrell and Ricketson which hold that the Agreement's mandatory dismissal provisions must be followed. As the District of Kansas succinctly stated in United States v. Schrum, 504 F. Supp 23, 25 (D. Kan. 1980), aff'd, 638 F.2d 215 (10th Cir.

1981):

> [The Act] can still be read to stand for the proposition that once the Act is applicable its commands must be followed precisely.

Here, there is no question that the Interstate Agreement was applicable and that its commands were not followed. Accordingly, it is abundantly clear that the Appeals Court decision is incorrect as a matter of law and will stand as a dangerous precedent and a panacea to prosecutors unless reversed by this Court.

Moreover, in requiring a prisoner to show an adverse impact on his rehabilitation as a condition precedent to his rights under the Agreement the Appeals Court has mistakenly shifted the burden of complying with the Agreement from the party states to the prisoner.

However, it is well settled that the

party states bear the burden of demonstrating compliance:

> The purpose of the Agreement requires that adverse consequences of official oversights be visited upon the prosecution, not the prisoner. Only in this way can the goals of the Agreement be achieved by requiring the officials concerned to learn of their duties under the Agreement and perform them conscientiously.

Romans v. District Court In and For Eighth Judicial District, 633 P. 2d 477, 481 (Colo. 1981)(en banc).

The rule of law articulated by the Appeals Court relieves the prosecution from the burden of complying with the Agreement since they will experience no adverse consequences as a result of their non-compliance. This is contrary to the Agreement's overall structure and operation and has the potential of spawning serious further abuses.

Conclusion

For all the foregoing reasons, the Petitioner requests that his petition be granted.

Respectfully Submitted

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APPENDIX

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
NOS. 027971,
027972

COMMONWEALTH

VS.

RALPH J. PETROZZIELLO

FINDINGS OF FACT AND
RULINGS OF LAW ON
DEFENDANT'S MOTION TO DISMISS

The issue presented in this case is should the instant indictments be dismissed because of the failure of the Commonwealth to follow the prerequisites of the Interstate Agreement on Detainers. For the reasons expressed below, I find that the Agreement does not apply and rule, therefore, the defendant's motion must be denied.

(1) On May 24, 1974, Boston Police Officer Donald A. Brown was shot and killed during the course of an armed robbery of the Purity Supreme Supermarket

in Roslindale. (Stipulation of the parties).

(2) On October 10, 1979, the defendant was indicted for first degree murder of Donald A. Brown and armed robbery. (Stipulation of the parties).

(3) On December 3, 1979, the Suffolk County District Attorney's Office by letter applied for a federal flight warrant against the defendant. (Stipulation of the parties).

(4) On December 5, 1979, the warrant described in paragraph 3 was delivered to the F.B.I. together with the original warrant for the defendant's arrest on charges of murder and armed robbery. (Stipulation of the parties).

(5) On August 5, 1983, the defendant was arrested in Huron, Ohio, and taken into federal custody pursuant to the federal flight warrant and a federal parole violation warrant issued September

26, 1979. (Stipulation of the parties.)

(6) On August 8, 1983, the federal parole violation warrant was lodged against the defendant at FCI Milan, Michigan, where he was being held. (Stipulation of the parties.)

(7) On August 9, 1983, Lieutenant Detective Robert Hudson sent a letter and detainer along with the defendant's photograph and fingerprints to FCI Milan, Michigan, where the defendant was being held. (Stipulation of the parties.)

(8) On August 11, 1983, a detainer action letter was sent to Lieutenant Detective Robert Hudson from the Federal Correctional Institution in Milan, Michigan. The letter indicated that the detainer had been received and filed against the defendant and that he was currently a marshall's holdover at that facility awaiting movement to his assigned Federal Institution. It was

further indicated that the detainer would be forwarded along with the defendant and Lieutenant Hudson would receive a tentative release date shortly after the defendant's arrival at his designated institution. (Stipulation of the parties.)

(9) On August 15, 1983, the defendant had a preliminary interview before a U.S. Probation Officer and on August 16, 1983, the interviewer made a recommendation to the U.S. Parole Commission that probable cause be found as to Charge 1 and Charge 2 of his alleged federal parole violations. (Stipulation of the parties.)

(10) Between August 8, 1983 and September 22, 1983, the defendant remained at FCI Milan, Michigan, pursuant to the federal parole violation warrant. (Stipulation of the parties.)

(11) On September 22, 1983, the defendant was transferred from FCI Milan,

Michigan, to FCI Danbury, Connecticut. (Stipulation of the parties.)

(12) On or about September 29, 1983, the defendant arrived in New Hampshire and was held in federal custody at New Hampshire State Prison pursuant to an agreement between the Federal Authorities and the State of New Hampshire allowing federal prisoners to be lodged at that institution. (Stipulation of the parties.)

(13) A federal parole violation hearing was scheduled for November 8, 1983, and January 11, 1984, but on each occasion, the hearing was continued at the request of the defendant. The defendant states that at the time he requested continuances, that he was seeking additional discovery. (Stipulation of the parties.)

(14) On or about December 2, 1983, counsel for the defendant wrote to the

Suffolk County District Attorney requesting that the defendant be arraigned as soon as possible and that a trial date be set. Similar letters were sent to the District Attorneys of Plymouth, Middlesex, and Berkshire Counties. (Stipulation of the parties.)

(15) The letter described in paragraph 3 was mailed on December 27, 1983, and was received by the District Attorney's Office on December 28, 1983. (Stipulation of the parties.)

(16) On December 7, 1983, Petrozziello submitted an Inmate Request Slip to his counsellor at New Hampshire State Prison requesting that the U.S. Marshall be contacted for copies of all detainers lodged against him. On December 12, 1983, Petrozziello was informed that he would be advised at his Parole Revocation hearing as to "who has what on you" (Stipulation of the parties.)

(17) On December 30, 1983, Assistant District Attorney Daniel Ford wrote to New Hampshire State Prison authorities requesting information as to how he might obtain custody of Ralph Petrozziello for purposes of arraignment on the State (Berkshire County) charges. (Stipulation of the parties.)

(18) On January 6, 1984, Berkshire County Assistant District Attorney Daniel A. Ford, filed a Petition for a Writ of Habeas Corpus Ad Defendum. The Petition was allowed that day by Simons, J. and the Habe sent to the U.S. Marshall's Office in Boston. (Stipulation of the parties.)

(19) On or about January 6, 1984, Assistant District Attorney, Daniel A. Ford, was informed by the U.S. Marshall's Office that they would not honor the Habe (Stipulation of the parties.)

Bernard Stone, the Deputy U.S.

marshall, informed Mr. Ford that it was the policy of the U.S. Marshall's Office in Massachusetts not to turn over federal prisoners awaiting federal action to state authorities under a Habe until all pending federal matters were resolved. Pending resolution of Mr. Petrozziello's federal matters, Mr. Ford was told that only a request under the Interstate Agreement on Detainers would be honored.

(20) In this case, all relevant parties (the U.S. Marshall's Office, all Massachusetts' District Attorney's offices, personnel at both the Berkshire and Suffolk County houses of correction and involved members of the state police) acted at all times in the belief that Mr. Petrozziello was transferrred to state custody under the terms of the Interstate Agreement on Detainers.

(21) On or about January 9, 1984, the Berkshire County District Attorney's

Office made a request for temporary custody ("Form V") of the defendant under the Interstate Agreement on Detainers (IAD) in order to bring the defendant to trial on charges of armed robbery while masked and the request was forwarded to the New Hampshire State Prison on January 10, 1984. (Stipulation of the parties.)

(22) On or about January 9, 1984, the prosecuting official, Assistant District Attorney, Daniel A. Ford, completed Form VI under the IAD, which authorized him to act for the receiving state in taking custody of the defendant in January of 1984, for trial in March of 1984. (Stipulation of the parties.)

(23) On January 9, 1984, Petrozziello was informed for the first time of the detainer lodged against him by the Berkshire County District Attorney's Office, and on January 17, 1984, he submitted an Inmate Request Form request-

ing final disposition of the Berkshire charges. (Stipulation of the parties.)

(24) I find that the provisions of both Articles III and IV of the Agreement were triggered in this case.

The District Attorney's Office in Berkshire County made its request for temporary custody under Article IV; however, since Mr. Petrozziello submitted an inmate request for final disposition under Article III on January 17, he was not advised of his right "to contest the legality of his delivery" as required by Article IV(a) and (d). Nor did the federal authorities wait "a period of thirty days after receipt" of the request for temporary custody before it was "honored." Article IV(a).

(25) On January 24, 1984, Petrozziello was transferred from Federal custody to the custody of Berkshire County, Massachusetts. The United States

Marshall instructed Berkshire County officials that Petrozziello was not to be released on bail and was not to be returned to the Marshall until the State is finished with him. Petrozziello was held at the Berkshire County House of Correction. (Stipulation of the parties.)

(26) Before turning Mr. Petrozziello over to Berkshire County, Deputy U.S. Marshall Bernard Stone spoke to representatives both from Suffolk and from Berkshire Counties. He informed them that Mr. Petrozziello was ready to be turned over but left the choice of which county would receive him first up to them. They chose Berkshire. Hence, it was understood by all appropriate officials in the Berkshire County District Attorney's Office at this time that following the resolution of matters against Mr. Petrozziello in that county he was to be returned to Suffolk County for trial on

the instant indictments.

(27) Upon taking custody of Petrozziello, the Berkshire County District Attorney notified every District Attorney in Massachusetts that, under the Interstate Agreement on Detainers, Petrozziello had to be tried on all State charges before he was returned to Federal custody. (Stipulation of the parties.)

(28) On January 25, 1984, Detective William DiGiuseppe mailed via Federal Express a letter and exemplified copy of the murder warrant to the Berkshire County House of Correction to be lodged as a detainer against the defendant. (Stipulation of the parties.)

(29) On January 26, 1984, the defendant was arraigned in Berkshire County on charges of armed robbery while masked. (Stipulation of the parties.)

(30) On or about Janaury 27, 1984, the Department of Corrections transported

the defendant from Berkshire County to the Charles Street Jail to hold the defendant as a "safe-keep" inmate at the request of the sheriff of Berkshire County. (Stipulation of the parties.)

(31) On January 30, 1984, the defendant was arraigned in Suffolk County Superior Court on charges of first degree murder and armed robbery and the order of notice was read to him. (Stipulation of the parties.)

(32) On March 13, 1984, the United States Parole Board determined that the defendant had violated the terms of his parole and the Board revoked his federal parole. (Stipulation of the parties.)

(33) On March 13, 1984, the defendant was transferred back to the Berkshire County House of Correction. (Stipulation of the parties.)

(34) On March 13, 1984, and March 15, 1984, pre-trial motions were heard in

the Berkshire County case. (Stipulation of the parties.)

(35) On March 19, 1984, before trial commenced, Petrozziello moved for dismissal of the Berkshire County indictment on the ground that he had made a request for final determination by his counsel's letter of December 2, 1983, and by his Inmate Request Slip of January 17, 1984; that the Berkshire County District Attorney's Office had delayed taking any action to obtain temporary custody from the date of the indictment, August 15, 1983, until January 1984, and that this violated Petrozziello's rights under the Intersate Agreement on Detainers. The motion to dismiss was denied and trial commenced on March 19, 1984. (Stipulation of the parties.)

(36) From March 19, 1984 - April 6, 1984, the defendant was tried in Berkshire County Superior Court on charges of

armed robbery while masked. (Stipulation of the parties.)

(37) On April 6, 1984, the defendant was acquitted on charges of armed robbery while masked. (Stipulation of the parties.)

(38) On April 10, 1984, State Troopers Richard Smith and Robert Bradley transported the defendant from the Berkshire County House of Correction to Springfield, Massachusetts.

(39) I found that the return of Mr. Petrozziello to federal custody on April 9 or 10 resulted from negligence by the District Attorney's Office in Berkshire County.

This finding is based on the following. From the evidence presented, I conclude that Mr. Petrozziello's acquittal was both a surprise and a substantial disappointment to the District Attorney's Office in Berkshire County. A temporary

paralysis apparently prevailed in the District Attorney's Office after the jury's verdict was returned. Such an atmosphere no doubt accounts for the following developments.

Major John Shaughnessy, the Director of Security at the Berkshire House of Correction, called First Assistant District Attorney Daniel Ford on the afternoon of April 6. The jury was deliberating at the time of the call. Mr. Ford, the prosecutor in the Berkshire action against Petrozziello, was out of his office. Shaughnessy left a message indicating that Ford should work out the problems concerning Petrozziello's transportation with the U.S. Marshall's Office. This message was not received by Mr. Ford until after he learned of the jury's disheartening (from his point of view) verdict. He then turned the message over to State Trooper Richard Smith

and told him to take care of it. Trooper Smith was assigned to the D.A's office. Smith then made a series of telephone calls regarding Mr. Petrozziello's transportation to Boston. His first call was to Bernard Stone in the U.S. Marshall's Office. Thereafter he made and received calls from the Berkshire County House of Correction. Finally, Trooper Smith learned that Berkshire County correction officials either could not or would not transport Petrozziello to Boston, so he made arrangements with Bernard Stone to turn Petrozziello over to Deputy US Marshalls at the Federal Courthouse in Springfield the following Monday. That evening, April 6, Trooper Smith fully apprised Mr. Ford of these arrangements. During his testimony, Mr. Ford admitted that he had been so advised; however, he thought at the time, so he testified, that the U.S. Marshalls were going to

transport Mr. Petrozziello back to Boston to the Suffolk County District Attorney. Instead, they transported Mr. Petrozziello to Danbury from which he was thereafter transferred to Louisberg.

(40) On April 10, 1984, at the U.S. Marshall's Office in Springfield, Troopers Smith and Bradley turned the defendant over to Deputy U.S. Marshalls Brendan Toolin, James Roche, and Paul Ahearn. A prisoner receipt was given to Troopers Smith and Bradley by Deputy U.S. Marshall Roche (Stipulation of the parties.)

(41) Between April 6th and 10th, 1984, the Suffolk County District Attorneys' Office was not contacted at any time by the U.S. Marshall's Office, Berkshire County District Attorney's Office, or the State Police regarding the defendant's custody, transportation, or turnover from State to Federal authori-

ties. (Stipulation of the parties.)

(42) Between April 6th and 10th, 1984, the Suffolk County District Attorney was not offered temporary custody of the defendant for purposes of trial. (Stipulation of the parties.)

(43) On or about April 12, 1984, the Suffolk County District Attorney's Office was notified for the first time, through defense counsel, that the defendant had been returned from the Berkshire County House of Correction to Federal custody and that the defendant was being held in Federal custody. (Stipulation of the parties.)

(44) On May 8, 1984, a Detainer Action Letter was sent to Detective William DiGiuseppe form the U.S. Penitentiary at Lewisburg, Pennsylvania. The letter indicated that the detainer had been filed against the defendant and that his tentative release date was July 30,

1984. (Stipulation of the parties.)

(45) On April 30, 1984, the Plymouth County District Attorney lodged a detainer against the defendant on a 1979 District court complaint charging him with armed robbery. The detainer was lodged at the United States Penitentiary at Lewisbury, Pennsylvania. (Stipulation of the parties.)

(46) On May 9, 1984, FCI Lewisburg sent a detainer action letter to the Plymouth County District Attorney's Office acknowledging the filing of the detainer and supporting the defendant's tentative release date as July 30, 1984. (Stipulation of the parties.)

(47) On or about May 31, 1984, the Plymouth County District Attorney's Office filed a Form 5 request for temporary custody under the Interstate Agreement on Detainers. Evidence of the Plymouth County District Attorney's

authority to act for the receiving state was filed on Form 6 on the same date. Also on May 31, 1984, the Plymouth County District Attorney filed a Form 7--prosecutor's acceptance of temporary custody. This form stated that it constituted "prosecutor's acceptance of temporary custody offered in connection with a prisoner's request for disposition of a detainer". (Stipulation of the parties.)

(48) On July 18, 1984, the officials at FCI Lewisburg wrote to Frances A. McIntyre, Assistant District Attorney in Plymouth County, stating that the defendant had appealed the request for temporary custody; that the appeal was reveiwed and denied, and that prison officials were enclosing an "offer to deliver temporary custody", and "certificate of inmate status" as required by the Interstate Agreement on Detainers. Assistant

District Attorney McIntyre was requested to forward Form 6 advising the time and date that the Plymouth County District Attorney intended to return the defendant into his jurisdiction. (Stipulation of the parties.)

(49) On or about May 10, 1984, the defendant filed a Motion to Dismiss the Suffolk indictments on the ground that the prosecution was barred by the Interstate Agreement on Detainers.

Rulings of Law

1. Any of the foregoing findings of fact which should more properly be considered rulings of law;

2. The Commonwealth of Massachusetts and the United States are both parties to the Interstate Agreement on Detainers. St. 1965 c. 892 sect. 1; Pub. L. No. 91-538, sects.1-8, 84 Stat. 1397-1403 (1970);

3. Article III of the Agreement pre-

scribes the procedures by which a prisoner "serving a term of imprisonment" may obtain a speedy disposition of charges pending in another jurisdiction against him. See G.L. c. 276 app. Art. III at 262;

4. Article IV of the Agreement prescribes the procedure by which a prosecuting officer in a state may obtain temporary custody of a prisoner "serving a term of inprisonment" in another state. See G.L. c. 276 app. Art. IV at 263;

5. One of the protections which the Agreement provides to a detainee is that all charges pending in a receiving state be dismissed if the detainee is returned to the sending state by the receiving state before it has resolved all of the outstanding charges pending therein against the detainee. This protection exists irrespective of whether the detainee is transferred pursuant to Article

III or Article IV. See Article III (d) and Article IV (e);

6. The provisions of the Agreement apply only to a prisoner "serving a term of imprisonment." On January 24, 1984, defendant was not "serving a term of imprisonment" within the meaning of the Agreement; accordingly, the Agreement does not apply to the circumstances of this case.

This ruling is based on the following:

A. The Agreement is intended to apply only to prisoners who are serving time within a correctional institution;

B. Those awaiting a parole revocation hearing are not serving time within a correctional institution within the terms of the Agreement, United States v. Dobson, 585 F2d 55, 61 (3rd Cir. 1978).

7. The fact that defendant's parole was revoked while he was in Massachusetts did

not transform the circumstances of his transfer to apply under the Agreement. It still did not apply to the January 24, 1984 transfer of defendant to state custody. This follows because the purposes of the Agreement were not disturbed by defendant's transfer. See United States v. Mauro, 436 U.S. 340, 359 (1978).

Defendant's motion to dismiss is hereby denied.

By the Court,

Rudolph F. Pierce
Justice of the
Superior Court

Commonwealth vs. Ralph J. Petrozziello, Further Appellate Review Denied, 397 Mass. 1102.

Commonwealth vs. Ralph J. Petrozziello Suffolk. March 10, 1986 - April 15, 1986 Present: Greaney, C.J., Kaplan, & Dreben, JJ., 22 Mass. App. Ct. 71.

Interstate Agreement on Detainers. Practice, Criminal, Defendant in custody of another jurisdiction, Detainer. Words, "Term of imprisonment."

A prisoner in Federal custody awaiting parole revocation proceedings who was brought into the Commonwealth pursuant to a detainer against him on August 9, 1983, by the district attorney for the Suffolk District in accordance with the Interstate Agreement on Detainers; whose parole was revoked by Federal authorities on March 13, 1984; and who, after having been transferred to the temporary custody of the district attorney for the Berkshire District and tried from March 19, 1984, through April 6, 1984, on a separate indictment, was acquitted and, by mistake, returned to federal custody without any disposition being made of the Suffolk indictments, was not entitled

thereby to dismissal of those indictments under art. III(a) and (d) of the agreement on the grounds that the 180 day time limitations for bringing him to trial had been exceeded where, since the relevant time period commenced on March 13, 1984, the date when his parole was revoked and he "entered upon a term of imprisonment," and since the period was tolled for the Berkshire trial, only 40 days had elapsed at the time he filed his motion to dismiss the Suffolk indictments on May 10, 1984. [ ]

A prisoner in Federal custody awaiting parole revocation proceedings who was brought into the Commonwealth pursuant to the lodging of a detainer against him by the district attorney for the Suffolk District in accordance with the Interstate Agreement on Detainers, and who, after being transferred to the temporary custody of the district attorney for the

Berkshire District for trial on a separate indictment, was acquitted and, by mistake, returned to Federal custody without any disposition having been made of the Suffolk indictments for first degree murder and armed robbery, was not entitled thereby to dismissal of those indictments under arts. III (d), IV (e) and V (c) of the agreement on the ground that he was returned to Federal custody before the charges underlying the Suffolk County detainer had been tried, where evidence in the record indicated that the district attorneys in question had intended to comply with the terms of the agreement, that the prisoner's return to Federal custody was the result of a mistake, that the prisoner's rehabilitation had not been adversely affected, and that the purposes of the agreement had not been violated. [ ]

INDICTMENTS found and returned in

the Superior Court Department on October 11, 1979.

A motion to dismiss was heard by Rudolph F. Pierce, J., and questions of law were reported by him to the Appeals Court.

Harry L. Manion, III (John B. Kinsellagh with him) for the defendant.

Judy G. Zeprun, Assistant District Attorney (Charles M. Campo, Jr., Special Assistant District Attorney, with her) for the Commonwealth.

GREANEY, C.J. The defendant moved in the Superior Court to dismiss indictments charging him with murder in the first degree and armed robbery. He maintains that dismissal was required because the Commonwealth had violated the Interstate Agreement on Detainers (Agreement), to which both the Commonwealth (St. 1965,

c. 892, sec. 1) and the United States (Pub. L. No. 91-538, 84 Stat. 1397 [1970]) are parties. After an evidentiary hearing, a judge of the Superior Court denied the motion and reported the question of the correctness of his ruling to this court.[1] See Mass. R. Crim. P. 34, 378 Mass. 905-906 (1979).

The facts were established by the judge after an evidentiary hearing and may be summarized as follows. On May 24, 1974, a Boston police officer was shot and killed during an armed robbery of a supermarket. On October 10, 1979, the

1. The report was intended to avert a lengthy trial in the event the ruling on the motion was found to be incorrect. The report poses four questions concerning the applicability of the Agreement. We do not think it necessary to labor over them and will instead consider the correctness of the judge's ruling in light of the facts and the requirements of the Agreement.

defendant was charged in two indictments with the armed robbery and the first degree murder of the officer. On December 5, 1979, the district attorney for the Suffolk District obtained a flight warrant against the defendant. This warrant was delivered to the Federal Bureau of Investigation together with the original Suffolk warrant for the defendant's arrest. On August 5, 1983, the defendant was taken into Federal custody pursuant to the flight warrant and a Federal parole violation warrant issued in 1979.[2] On August 9, 1983 the Suffolk District Attorney sent a detainer to the Federal correctional institution in Milan, Michigan, where the defendant was

2. At the time, the defendant was allegedly in violation of his parole from a federal sentence he was serving at the Federal Correctional Institution in Lewisburg, Pennsylvania.

incarcerated pending disposition of the parole revocation proceedings.

The defendant was thereafter moved, on September 22, 1983, from Milan to the Federal correction institution in Danbury, Connecticut, and moved again, on September 25, 1983, from Danbury to the State prison in New Hampshire, where he was held as a Federal prisoner. Parole violation hearings scheduled for November 8, 1983, and January 11, 1984 were continued at Petrozziello's request.

On December 2, 1983, counsel for the defendant requested by letter that the Suffolk district attorney's office arraign and try him as soon as possible on the robbery and murder charges. On December 7, 1983, the defendant requested that the United States Marshall provide him with copies of all detainers lodged against him. He was told, on December 12th, that at his parole revocation hear-

ing he would be advised of "who has what on you." On January 10, 1984, the district attorney for the Berkshire District formally requested temporary custody of the defendant, pursuant to art. IV of the Agreement, in order to try him on an indictment for armed robbery while masked. The defendant was informed of the Berkshire detainer, and on January 17, 1984, requested, pursuant to art. III of the Agreement, and disposition of all charges against him.

On January 24, 1984, the defendant was transferred to the custody of Berkshire County. Upon taking custody, the district attorney there notified all Commonwealth district attorneys and under the Agreement the defendant had to be tried on all State charges before being returned to Federal custody.

On January 26, 1984, he was arraigned in the Superior Court in Berk-

shire County on the armed robbery while masked charge pending in that county and arraigned on January 30, 1984, in the Superior Court in Suffolk County on the armed robbery and murder charges pending here. On March 13, 1984, the United States Parole Board revoked the defendant's parole. From March 19, 1984, through April 6, 1984, he was tried before a jury in Berkshire County and acquitted of the armed robbery while masked offense. The defendant was then returned to Federal custody on April 9th or 10th as a result of a mistake on the part of the district attorney's office in Berkshire. The circumstances of that transfer are more fully described in the judge's findings as follows:

> "I find that the return of Petrozziello to Federal custody on April 9 or 10 resulted from negligence by the district attorney's office in Berkshire County.
>
> "This finding is based on

the following. From the evidence presented, I conclude that Petrozziello's acquittal was both a surprise and a substantial disappointment to the district attorney's office in Berkshire County. A temporary paralysis apparently prevailed in the district attorney's office after the jury's verdict was returned. Such an atmosphere no doubt accounts for the following developments.

"Major John Shaughnessy, the director of security at the Berkshire house of correction, called first assistant district attorney Daniel Ford on the afternoon of April 6. The jury was deliberating at the time of the call. Mr. Ford, the prosecutor of the Berkshire action against Petrozziello, was out of his office. Shaughnessy left a message indicating that Ford should work out the problems concerning Petrozziello's transportation with the United States Marshal's Office. This message was not received by Mr. Ford until after he learned of the jury's disheartening (from his point of view) verdict. He then turned the message over to State trooper Richard Smith and told him to take care of it. Trooper Smith was assigned to the district attorney's office. Smith then made a series of telephone calls regarding Mr. Petrozziello's transportation to Boston. His first call was to Bernard Stone in the United States Marshal's Office.

> Thereafter he made and received calls from the Berkshire County house of correction. Finally, trooper Smith learned that Berkshire County correction officials either could not or would not transport Petrozziello to Boston, so he made arrangements with Bernard Stone to turn Petrozziello over to Deputy United States Marshals at the Federal courthouse in Springfield the following Monday. That evening, April 6, trooper Smith fully apprised Mr. Ford of these arrangements. During his testimony, Mr. Ford admitted that he had been so advised; however, he thought at the time, so he testified, that the United States Marshals were going to transport Mr. Petrozziello back to Boston to the Suffolk County district attorney. Instead, they transported Petrozziello to Danbury, from which he was thereafter transferred to Lewisburg."

The district attorney in Suffolk was not notified of the defendant's transfer at any time between April 6th and 10th, but first learned of the defendant's return to Federal custody on April 12, 1984. On May 10, 1984, the defendant's counsel filed this motion to dismiss the

Suffolk indictments on the ground that the Agreement had been violated.

The defendant alleges two violations of the Agreement that he contends require dismissal of the Suffolk County indictments for murder and robbery. First, he maintains that the indictments must be dismissed because pursuant to subsections (a) and (d) of art. III of the Agreement the Suffolk district attorney's office failed to try him within 180 days of the lodging of a detainer against him by that office on August 9, 1983. Second, he maintains that arts. III(d), IV(e) and V(c) require dismissal because he was returned to Federal custody before the charges underlying the Suffolk County detainer were tried.[3]

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3 The defendant also argues that the Commonwealth should be estopped from asserting the inapplicability of the Agreement. We need not consider this argument because we conclude that the Agreement applies to this case.

Before discussing these contentions, we think it useful to summarize the background of the Agreement and the manner in which it operates.

The Agreement provides a prisoner with an orderly method for the final resolution of pending detainers[4] and fur- furnishes prosecutors with a uniform procedure by which they can obtain temporary custody of a prisoner for purposes of trial. In so doing, the Agreement sought to redress certain abuses involving detainers. Before the Agreement's enactment, it was commonplace to see detainers routinely filed, often with little basis in fact, which worked to the

4. The Agreement contains no definition of the term "detainer," but the Senate report recommending its enactment defines a "detainer" as "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction."

prisoner's prejudice. See Carchman v. Nash, 105 S. Ct. 3401, 3408 (1985). In many cases, the prisoner's custodians would consider the pending charges underlying the detainers as proof of criminal proclivity adversely affecting the prisoner's eligibility for work assignments, other rehabilitation opportunities, and parole. Id. at 3408-3409. See also United States v. Scheer, 729 F. 2d 164, 166-67 (2d Cir. 1984). It was not infrequent to see a continual cycle of prosecution, a return to imprisonment, and prosecution without any rehabilitation in between. It was also not unusual for pending detainers to be withdrawn shortly before the prisoner was released. Carchman v. Nash, supra at 3408. This generally unregulated system frustrated both prisoner and prosecutor. To alleviate these problems the Agreement was adopted to "encourage the expeditious and

orderly disposition of [pending] charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints." United States v. Scheer, supra at 167, quoting from art. I of the Agreement.

The provisions of art. III and IV form the core of the Agreement. Article III focuses on the prisoner. Article III (a) provides that a prisoner who "has entered upon a term of imprisonment" can request the speedy disposition of the charges giving rise to a detainer. If the prisoner makes such a request, the jurisdiction that filed the detainer must bring him to trial within 180 days. For good cause, however, a court may grant necessary or reasonable continuances which extend this time. Article III(c) requires that the prisoner's custodian shall promptly inform him of detainers lodged against him and of his right to

make a request for final disposition of the underlying charges. Article III(d) states that any request for final disposition operates as a request for final disposition of all untried indictments underlying all detainers that have been lodged by the particular State. This subsection also prescribes a penalty of dismissal with prejudice if the prisoner is returned to his original place of confinement without having been tried on the charges. Under art. III(e), the prisoner's request for final disposition constitutes a waiver of extradition.

Article IV addresses the prosecutor's ability to obtain temporary custody of a prisoner who has entered upon a term of imprisonment and places two limitations on that authority. Article IV (c) provides that the prisoner is to be tried within 120 days of his arrival in the State, but, like art. III, permits neces-

sary or reasonable continuances to extend that time. Article IV (e) also requires dismissal of the indictment with prejudice if it is not tried prior to the prisoner's being returned to his original place of imprisonment.[5]

1. With this background in mind, we turn to the defendant's specific contentions. The essence of his first argument is that, because more than 180 days elapsed between the lodging of the detainer by the Suffolk district attorney's office on August 9, 1983, and the May 10, 1984, filing of his motion to dismiss, the time limitations imposed by the Agreement have been exceeded and the Suffolk indictments must be dismissed with prejudice.

The most obvious difficulty with

5. The requirement of dismissal in arts. III and IV is repeated in art. V(c).

this contention lies in the defendant's status between August 9, 1983, and March 13, 1984. During that period, he was held as a putative parole violator and not as a prisoner serving a sentence. Both arts. III and IV of the Agreement expressly permit only a prisoner who "has entered upon a term of imprisonment" to request the final disposition of pending charges. It is the prevailing law that an individual who is awaiting a determination whether he has violated his parole is not yet serving a "term of imprisonment" within the meaning of that language in the Agreement. United States v. Dobson, 585 F.2d 55, 58-61 (3d Cir. 1978)[6]. The defendant did not again

6. The Court in Dobson (at 58-59), explained the situation as follows:

> "It seems clear to us that the natural meaning of the phrase 'serving a term of imprisonment' denotes no more or less than that definable period of time during which a prisoner must be confined in order to

(footnote continued)

complete or satisfy the prison term or sentence which has been ordered. Thus, the very words of the statute would appear to exclude those held in custody for periods of time which are not defined in terms of duration, which are not certain, and which do not follow a conviction or determination of parole revocation. Hence even though we recognize that the basis for a parolee's detention is the underlying sentence from which he has been paroled, until such time that the parole violator is recommitted after a hearing, and his incarceration thereby made certain and fixed as to duration, no term of imprisonment can be said to have commenced or resumed. In this respect a parole violator is no different than a pretrial detainee who is merely awaiting trial and who, until conviction and sentencing, cannot commence service or a term of imprisonment.

"Indeed, until conviction at trial and the imposition of a sentence, the length of the pretrial detainee's confinement is uncertain. So too until a parole revocation hearing has been held, and the parole violator's parole is revoked and he is recommitted, his status with respect to confinement is similarly uncertain. In short, just as pretrial incarceration is a transitory and impermanent state, incarceration pursuant to a parole violation warrant is just as transitory and impermanent. Both place the prisoner in no more than a 'holding pattern.'" (Footnote omited, emphasis in original.)

enter upon a term of imprisonment until March 13, 1984, when his parole was revoked and he resumed serving his Federal sentence.

The question, therefore, becomes which of several dates should be chosen as the date for the commencement of the periods set forth in the Agreement.[7] The defendant contends that the four requirements which trigger the relevant time periods in the Agreement[8] do not have to

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7. "The choice is among August 9, 1983, when the detainer was lodged; December 2, 1983, when the defendant's counsel requested in writing that the Suffolk district attorney arraign and try his client on the Suffolk indictments; January 17, 1984, when the defendant made what we will assume to be a proper request for the disposition of all charges against him; or March 13, 1984, when the defendant had his parole revoked and resumed serving his Federal sentence.

8. These requirements are: the prisoner's entering upon a term of imprisonment; the existence of pending extra-jurisdictional charges; the

occur in any special sequence. He reasons that, upon the occurrence of the last of the requirements, the limitation periods should be deemed to have commenced running on the date of the first requirement, here August 9, 1983, when the Suffolk detainer was filed. The calculation, of course, supports his position. If carried to its logical extreme, however, such an approach would likely cause considerable confusion. For example, immediately upon pretrial detention, prisoners could file requests under the Agreement for final disposition of all charges pending in other jurisdictions, even though they had not yet been convicted of the offense for which they were held, had their places of confinement finally determined, or had detainers

(footnote continued)

> lodging of a detainer based upon those charges; and the prisoner's request for final disposition of them.

lodged against them. Prosecuting officers would, in turn, be pressed to file detainers prematurely in order to avoid the loss of their rights to prosecute. Not surprisingly, there is little authority to support the argument favoring this methodology.[9]

We think that the applicable date for measuring the relevant time periods in this case is no earlier than March 13, 1984, when the defendant actually entered

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9. The defendant relies heavily on the decision in United States v. Hutchins, 489 F. Supp. 710, 713 (N.D. Ind. 1980). There is language in that decision (at 713) that the four requirements described in note 8, supra, do not have to "accrue in any special sequence." That decision, however, does not support the defendant's position that the relevant time relates back to the date the detainer is filed. The other decision relied on by the defendant, Nash v. Jeffes, 739 F. 2d 878 (3d Cir. 1984), was reversed by the United States Supreme Court in Carchman v. Nash, 105 S. Ct. 3401 (1985).

upon a term of imprisonment. On that date all four requirements under the Agreement had been satisfied.[10] We can assume that the defendant was not required to file after March 13, 1984, a new request for the final disposition because both the Berkshire and Suffolk prosecutors should have been aware of the applicability of the Agreement, and both were fully prepared to try Petrozziello.[11]

Lastly, we must determine what peri-

10. Establishing this date as the critical one follows the approach used in United States v. Hutchins, supra, the case upon which the defendant primarily relies. See note 9, supra.

11. We do not suggest that in other cases it would be inappropriate to require that the four events occur in the order suggested by note 8, supra. Situations arising under the Agreement are fact specific and, like most speedy trial problems, are to be dealt with descretely, not mechanically.

ods of time have expired under the relevant limitations periods. Both art. III(a) and art. IV(c) provide for the tolling of those periods during "any necessary or reasonable continuance." See United States v.. Scheer, 729 F. 2d at 168-169; United States v. Roy, 771 F. 2d 54, 59 (2d Cir. 1985); Commonwealth v. Fasano, 6 Mass. App. Ct. 325, 333 (1978). Here, the Agreement's speedy trial clock ran for six days (March 13 through March 18, 1984) before it was tolled for the Berkshire trial (March 19 through April 6, 1984). It then ran from April 7, 1984, until May 10, 1984 (a total of thirty-four days), when this motion to dismiss was filed. It has been suspended ever since by the time required to decide the motion. See Commonwealth v. Fasano, 6 Mass. App. Ct. at 333-334 (1978). The clock will not start running again until the rescript on this appeal has been

entered in the trial court. Thus, forty days have elapsed, and no relevant time period in the Agreement has been violated.[12]

2. The defendant's second argument is that the language in arts III(d), IV(e), and V(c) of the Agreement requires dismissal of the Suffolk County indictments because he was returned to Federal custody after his acquittal on the Berkshire charge.

We do not think that the drastic sanction of dismissal of first degree murder and armed robbery charges should apply where the defendant's return to Federal custody was the result of a mistake. The Berkshire district attorney's letter to all other district attorneys

12. We assume that the Suffolk district attorney will bring his decision to the attention of his counterparts in the Northern Plymouth districts, who also have indictments pending against the defendant.

warning them of the requirements of the Agreement is evidence of an intention to comply with its terms. On April 6, 1984, when the Berkshire trial ended, the Suffolk prosecutor was fully prepared to try the defendant immediately on the pending indictments. The Suffolk prosecutor was unaware of the defendant's return to Federal custody and assumed, as Mr. Ford testified, that the defendant would be transferred directly from Berkshire to Suffolk, where he would stand trial. Thus, this is not a case where detainers were being used "by prosecutors to exact punishment without having to try a charge which they feel would not result in a conviction." Note, Detainers and the Correctional Process, 1966 Wash. U.L.Q. 417, 423. In this important respect, the purposes of the Agreement cannot be said to have been violated.

Moreover, we do not consider dismis-

sal appropriate in the absence of proof that the defendant's rehabilitation has been adversely affected. "Many ... courts ... have concluded that indictments should not be dismissed under [the Agreement] if the prisoner has not shown that his return to the sending state before trial in the receiving state impeded or affected his rehabilitation." Malone v. United States, 482 A.2d 768, 771 (D.C. 1984), and numerous cases cited. While in some cases proof that the prisoner's rehabilitation has been affected may not be necessary before an order of dismissal is entered, we think, in view of the seriousness of the charges, that such proof was required here.[13]

13. The defendant makes only a conclusory statement in his reply brief that his efforts at rehabilitation "may be frustrated." This statement is insufficient to establish that his return to Suffolk would contravene a main purpose of the Agreement.

We recognize that some courts have approved dismissals based on the flat language of the Agreement, regardless of whether the sanction furthered its purposes. See the cases cited in Malone v. United States, 482 A.2d at 772. The decisions, at least principally relied upon by the defendant, are distinguishable or of questionable vitality.[14] More recent

14. See, e.g. State v. Williams, 425 So. 2d 621 (Fla. App. 1983); State v. Keener, 224 Kan. 100 (1978); United States v. Eaddy, 595 F.2d 341 (6th Cir. 1979). In Wiggins, after a Federal prisoner filed a request for final disposition of detainers that had been lodged against him in two Florida counties, one county asked for, and was granted, temporary custody of the prisoner pursuant to the Agreement. That charge disposed of, the prisoner was returned to Federal custody and released on parole before the second county sought extradition to pursue its charges. Thus, the very vice the Agreement seeks to remedy (dormant detainers awaiting the conclusion of prior sentences) was committed by the State authorities. Furthermore, the opinion, barely two pages long, provides no other information about the circumstances that gave rise to it. In

decisions view cases like the present one with circumspection, and decline to dismiss serious charges where that sanction would not further the Agreements' purposes. See Malone v. United States, 771 F.2d 54 (2d Cir. 1985). In this respect, the decisions follow what now appears to be the attitude of the United States Supreme Court concerning the Agreement's construction. See Carchman v. Nash, 105

(footnote continued)

> Keener, the facts track ours more closely. However, one of the cases cited therein for its central proposition (United States v. Mauro, 544 F.2d 588 [2d Cir. 1976]) was reversed (United States v. Mauro, 436 U.S. 340 [1978]), casting doubt on the continued validity of the Keener decision. In Eaddy, the authorities violated the time requirements of arts. III and IV by not bringing the prisoner to trial for 291 days, and twice transferred him back to Federal custody after a detainer had been lodged against him. Moreover, the Government did not even contest that the time requirements of the Agreement had been violated.

S. Ct. at 3410-3411.

Having dealt with all the issues raised by the reported questions, and having found the judge's denial of the motion correct, we see no need to frame a rescript beyond:

Order denying motion to dismiss affirmed.

Interstate Agreement on Detainers, Mass. Gen. Laws ch. 276 App. et. seq. (1970).

Sec. 1.1 Form and contents

An agreement is hereby entered into by this commonwealth with all other jurisdictions legally joining therein in substantially the following form:

AGREEMENT ON DETAINERS

The contracting states solemnly agree that:

ARTICLE I.

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, information or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct pro-

grams of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the purpose of this agreement to provide such cooperative procedures.

ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia;

the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer

has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for final disposition to be made of the indictment, information or complaint; provided, that, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time

of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction or other official having custody of the prisoner, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of correction or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the

detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner or correction or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being intiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request,

and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver or extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to

the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition refered to in paragraph (a) hereof shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending, shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of

imprisonment in any party state made available in accordance with paragraph (a) of Article V upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided, that, the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and, provided further, that there shall be a period of thirty days after receipt by the appropriate authorities before the request is honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon the motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities

having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for temporary custody or availability and of the reasons thereof.

(c) In respect to any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good

cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further

force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that a speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's

presence in federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which

the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any further force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at the court and while being transported to or from any place at which his presence may be required, the

prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape

from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or

affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities thereof.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting

jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

This agreement shall be liberally

construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement shall be held contrary to the constitution of any state perty hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matter.